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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOE NUNES et al.,

Plaintiffs and Respondents,

v.

CENTRAL VALLEY DAIRYMEN, INC., et al.,

Defendants and Appellants;

MEL-NAT PROPERTIES, LLC, et al.,

Objectors and Appellants.

F056381, F056917 & F056943

(Super. Ct. No. 147653)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Hugh M. Flanagan, Judge.

Law Offices of Peter J. Dean and Peter J. Dean for Defendants and Appellants Central Valley Dairymen, Inc. and California Milk Market, Inc.

Mahoney & Soll, Paul M. Mahoney and Richard A. Soll for Defendants and Appellants George Vierra and Mary Vierra and Objectors and Appellants.

Lanahan & Reilley, Michael J.M. Brook and Kadin W. Blonski for Plaintiffs and Respondents.

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Introduction

Before us are three appeals, consolidated by stipulation of the parties and previous order of this court. The appeals arise from a judgment and postjudgment orders in a civil action for fraud, breach of contract, and related causes of action.

The Parties

Plaintiffs (respondents) are 13 dairy operators who were members of a dairy marketing cooperative, Central Valley Dairymen, Inc.[1] The cooperative was managed, at relevant times, by George Vieira. Appellants in F056381 and F056917 are the original defendants in the trial court, Central Valley Dairymen, Inc., California Milk Market, Inc., George Vieira, and Mary Vieira. Appellants in F056943 (Mel-Nat Properties, LLC, Astrix Marketing Services, LLC, Premio Investment Company, LLC, Ideal Management Resource, Inc., and West Coast Commodities) are corporations owned or controlled by George Vieira and Mary Vieira; those corporations were added as judgment debtors after the judgment against the Vieiras.[2]

The Issues on Appeal

On appeal, the Vieira defendants (see fn. 2) contend that plaintiffs' claims against those defendants were properly claims of CVD, that the claims should have been brought as shareholder derivative claims, and that plaintiffs failed to prove they were entitled to pursue the derivative claims. The Vieira defendants also contend the judgment against

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[1] Plaintiffs are: Joe Nunes, John Nunes, Sr., Antonio Brasil, Manuel Luis, Maria Brasil, Peter Nunes, Cidalia Oliveira, Fernando Brasil, Manuel Cipriano, Joe Azevedo and Frank Silva (doing business as Azevedo & Silva Dairy and awarded judgment under that name), and Five Star Dairy, Inc.

[2] For convenience, we will sometimes refer to George Vieira, Mary Vieira, and California Milk Market, Inc., as the "Vieira defendants." We will refer to Mel-Nat Properties, LLC, Astrix Marketing Services, LLC, Premio Investment Company, LLC, Ideal Management Resource, Inc., and West Coast Commodities as the "affiliated entities." As do the parties, we will refer to Central Valley Dairymen, Inc., as CVD and California Milk Market, Inc., as CMM.

them is excessive and unsupported by admissible evidence. They contend the court erred in admitting testimony of plaintiffs' damages expert and in denying their posttrial motions to vacate the judgment and for new trial based on the erroneous admission of such evidence.

Mary Vieira and CMM contend there is no evidence to support a fraud judgment against them because they owed no fiduciary duty to the plaintiffs. George Vieira contends, as to the portion of the judgment in favor of Joe Nunes, John Nunes, Antonio Brasil, Manuel Luis, and Manuel Cipriano arising from losses from investing in Valley Gold, LLC, that Vieira had no duty to disclose "the nature and extent" of his own criminal involvement with a cheesemaker (Suprema) which did business with CVD. George Vieira further contends the court abused its discretion in permitting evidence of Vieira's prosecution and plea agreement in connection with the Suprema case.

The affiliated entities contend in their appeal that the court erred in adding them as judgment debtors under an alter ego theory of liability because, under established law, the assets of a corporation are not available to satisfy the personal debts of its shareholders.

CVD contends the portion of the judgment awarding contract damages against it was contrary to the contract between CVD and its members, including plaintiffs, because it was only obligated to pay its members after it got paid by milk purchasers, which never occurred in this case. As to the postjudgment order awarding attorney fees, CVD contends the trial court erred both in awarding attorney fees to plaintiffs and in denying CVD's motion for attorney fees from the plaintiffs.

Finally, all of the appellants contend the trial court erred in granting plaintiffs' motion to tax costs and in denying their own motion to tax costs.

We will conclude that the plaintiffs failed to establish individual causes of action against the Vieira defendants for misappropriation of business opportunities; such causes of action belonged to the cooperative and could only be pursued by the members in a derivative action. We will conclude the judgment against CVD for failure to pay for

plaintiffs' milk must be reversed because payment was not due under the bylaws of CVD and the California statutory framework. Finally, we conclude judgment for five of the plaintiffs, based on their investments in Valley Gold, must be affirmed; this portion of the judgment was supported by the evidence and was not tainted by claimed evidentiary error.

Facts and Procedural History

Plaintiffs were members of CVD, an agricultural marketing cooperative formed under Food and Agricultural Code section 54001 et seq.[3] (Such cooperatives that deal specifically in milk and milk products are also governed by section 61331 et seq.) From the time of its formation in 1992 through its demise in 2003, CVD had approximately 70 members at any one time.

George Vieira was chief executive officer and general manager of CVD from the time of its formation. At some point, he became a "consultant" but continued to manage the cooperative.

Those facts constitute virtually the only uncontradicted evidence in this case. There was conflicting evidence concerning what George Vieira did, why he did it, and whether some or all of the plaintiffs knew about and approved of his actions. We summarize the evidence, however, in accordance with the applicable standard of review, setting forth the evidence most favorable to the verdict when supported by substantial evidence. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

Three sets of action taken by George Vieira form the basis for plaintiffs' causes of action.

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[3] All further statutory references are to the Food and Agricultural Code except as otherwise specified.

1. ***Misappropriation of CVD funds and business opportunities.***

Through various misrepresentations to the CVD board of directors, George Vieira convinced CVD to pay over $1 million in attorney fees for the Vieiras and their related corporations. Claiming he was owed "commissions" that had not been paid, George Vieira directed that $125,000 of such bonuses be paid on his behalf to a law firm preparing an estate plan for the Vieiras. When the Vieira defendants became the subject of a federal investigation in New Jersey, discussed more fully below, George Vieira claimed CVD should pay his attorney fees because he had been acting in CVD's interest and any investigation might harm CVD. CVD paid all of the defense fees related to George Vieira's prosecution.

In addition to these direct payments of attorney fees by CVD on behalf of the Vieira defendants, George Vieira also engineered a scheme to divert CVD income before it was paid to the cooperative. CMM was a company Mary Vieira bought from her brother in 1993. When CVD shipped milk to certain purchasers, George Vieira designated a portion of that milk as belonging not to CVD, but to CMM. Because CMM was a licensed milk broker, it could (and did) sell the milk at a higher price than CVD (as a producers' cooperative) was permitted to charge for the milk. CMM kept the difference in price and paid CVD the lower price, misrepresenting to CVD that CMM had received this price acting on behalf of CVD to place its excess milk. The jury inferentially concluded CMM collected $54 million in excess payments over the five-year period the scheme was in operation.

In 2001, a dairy cooperative from Idaho sought the assistance of CVD in selling its milk in California. While he was the full-time chief executive officer of CVD, George Vieira entered into a side contract with the Idaho cooperative, pursuant to which he was paid for consultant services, apparently at a rate of 10 percent of the net income of the Idaho cooperative.

Finally, George Vieira represented to the CVD board of directors he was owed additional bonuses. He caused CVD to pay $500,000 of such funds for an interest in a cheese processing plant, Valley Gold, LLC, (discussed further below), with that interest to vest in one of George Vieira's corporations, Premio Investment Company.

2. *Suprema losses.*

George Vieira's scheme involving the sale of CVD milk through CMM had a further consequence. One of the cheese manufacturers to which CVD delivered milk was Suprema Specialties West, Inc., a subsidiary of Suprema Specialties, Inc. (collectively, Suprema). After a criminal conspiracy involving fraudulent billing practices, Suprema declared bankruptcy while owing CVD $3,374,364.87 for milk CVD had delivered. Because George Vieira had used the CMM scheme to sell a portion of the milk through CMM, CVD was unable to recover the value of the milk from the Milk Producers Security Trust Fund, since that fund only covers direct sales from dairy producers to manufacturers that enter into bankruptcy. (§ 62580, subd. (g).) Because Suprema's records showed a portion of the milk sold was owned by CMM, the fund paid CVD only $1,363,964.70 of the total owed by Suprema.

3. *Valley Gold investment.*

In 2002 and 2003, several large customers of CVD went out of business or cancelled their contracts with CVD. As a result, CVD had excess capacity and the cost of transporting the milk to new markets was prohibitive. Land O' Lakes had recently closed a cheese plant in Gustine, California. Vieira led an effort to purchase and reopen that plant to provide a new market for CVD milk. He caused the preparation and presentation of an offering memorandum or prospectus for presentation to plaintiffs Joe Nunes, John Nunes, Antonio Brazil, Manuel Luis, and Manuel Cipriano (hereafter, the investors). The new venture was called Valley Gold, LLC. The investors each invested $100,000 in the venture, except for Cipriano, who invested $170,000.

George Vieira represented to the investors that he had an additional investor from New Jersey who would also purchase all the cheese the plant could manufacture. The New Jersey man neither invested in nor bought cheese from Valley Gold. George Vieira failed fully to disclose his own involvement in the Suprema criminal conspiracy.

Valley Gold failed. It closed owing CVD $17.8 million for milk delivered to Valley Gold.

4. The pleadings and the trial.

Plaintiffs sued the Vieira defendants, as well as the law and accounting firms employed by CVD and Valley Gold. CVD filed a cross-complaint alleging, as relevant here, that the individual plaintiffs had breached various contracts with CVD.

The case went to trial only against CVD and the Vieira defendants. The jury was given a lengthy (14-page) special verdict form, submitting to it questions concerning the complaint and the cross-complaint. The jury made the following determinations:

-- CVD breached its contract to pay each of the plaintiffs for their milk. (The jury was not required to assess damages because the parties stipulated to the damages in the event the jury found CVD had breached the contract.)

-- Plaintiffs were intended third-party beneficiaries of the milk purchase agreement between CVD and Valley Gold. (The jury was not required to assess damages because the parties stipulated to the damages if the jury determined plaintiffs were third-party beneficiaries. Valley Gold is defunct and did not appeal from the judgment.)

-- George Vieira knowingly or recklessly made "false representations of important fact" to those plaintiffs who invested in Valley Gold, and he intended that those plaintiffs would rely on the representations. Those plaintiffs reasonably relied on those representations; the representations and misrepresentations by George Vieira were a substantial factor in causing harm to those plaintiffs. Four of the plaintiffs (Joe Nunes, John Nunes, Antonio Brasil and Manuel Luis) each suffered damages of $10,000 as a result of the misrepresentation; Manuel Cipriano suffered damages of $20,000.

-- George Vieira was in a fiduciary relationship with the investor-plaintiffs. George Vieira intentionally failed to disclose important facts to those plaintiffs with the intention of deceiving them as investors in Valley Gold. They reasonably relied on that deception, resulting in harm to them. The investor-plaintiffs each suffered damages in the amount of $30,000, except for Manuel Cipriano, who suffered damages in the amount of $45,000.

-- George Vieira negligently made false representations to the investor-plaintiffs, intending that they would rely on such representations. The investor-plaintiffs reasonably relied on the representations. The investor-plaintiffs each suffered damages in the amount of $10,000, except for Manuel Cipriano, who suffered damages in the amount of $20,000.

-- George Vieira and Mary Vieira used CMM to sell milk and other dairy products that should have been sold directly by CVD, thereby depriving CVD of a valuable business opportunity. The board of directors of CVD had no knowledge of and did not consent to these activities. George Vieira, Mary Vieira, and CMM acted fraudulently in conducting these sales, and their conduct was a substantial factor "in causing harm to plaintiffs." Each of the plaintiffs suffered damages in the amount of $1,600,000 as a result of these activities.[4]

-- Nine of the cross-defendants (that is, plaintiffs Joe Nunes, John Nunes, Pete Nunes, Antonio Brasil, Joe Brasil, Fernando Brasil, Joe Azevedo, Frank Silva, and Cidalia Oliveira) breached their membership contracts with CVD by failing to give the required prior notice before withdrawing as members of the cooperative. (The jury was not required to assess damages because the parties stipulated to the liquidated damages

[4] Although named separately as plaintiffs, Joe Azevedo and Frank Silva, who operated a dairy together, were treated as a single entity under their business name of Azevedo & Silva Dairy. In all further references to damages awarded to "each plaintiff," that reference includes a single award to Azevedo & Silva Dairy.

provision of the membership agreement in the event the jury rejected the members' claim that their failure to give notice was excused.)

-- Joe Nunes breached his agreement to pay to CVD money owed by George Azevedo. In reliance on Nunes's promise to pay on Azevedo's behalf, CVD released Azevedo from the debt. As a result, CVD suffered damages in the amount of $100,000.

-- Joe Nunes breached his contract to pay CVD for grain he purchased. As a result, CVD suffered damages in the amount of $174,000.

-- Joe Nunes, John Nunes, and Frank Silva, as members of the CVD board of directors, owed a fiduciary duty to CVD. Their breach of this duty damaged CVD in the sum of $1,000. These three plaintiffs/cross-defendants did not commit fraud against CVD. They did not intentionally disrupt CVD's performance of a contract with Astrix Marketing and did not negligently interfere with prospective economic relationships between CVD and Astrix Marketing.

As a result of the jury's findings and the parties' stipulations concerning damages, each of the plaintiffs was awarded judgment against Valley Gold; the amount of such judgments ranged from $42,445.82 (Fernando Brasil) to $2,214,042.38 (Manuel Luis). Each plaintiff was awarded judgment for $1,600,000 against George Vieira, Mary Vieira, and CMM, jointly and severally. Each plaintiff was awarded judgment against CVD in an amount reduced by any offsets resulting from verdicts in favor of CVD on cross-complaint causes of action against the various plaintiffs; in the case of Joe Nunez, those offsets resulted in a net judgment in favor of CVD in the amount of $42,258.30. The net judgments in favor of the other plaintiffs against CVD ranged from $25,608.67 (Fernando Brasil) to $2,214,042.38 (Manuel Luis). CVD was awarded $1,000 against Joe Nunes, John Nunes, and Frank Silva, jointly and severally. Four of the plaintiffs who invested in Valley Gold (Joe Nunes, John Nunes, Antonio Brasil, Manuel Luis) each was awarded judgment against George Vieira in the amount of $30,000; the fifth investor-plaintiff, Manuel Cipriano, was awarded judgment against George Vieira in the amount of

$45,000. (The other awards for concealment and misrepresentation were struck as duplicative after a posttrial motion.)

After their new trial motion was denied, CVD and the Vieira defendants filed a notice of appeal. This appeal is our case No. F056381.[5]

Plaintiffs filed a motion to add the affiliated entities as additional judgment debtors on the basis they were alter egos of George Vieira and Mary Vieira. That motion was granted and a new judgment adding those entities was entered. The amended judgment added the affiliated entities as additional judgment debtors where judgment had been awarded against either George Vieira, Mary Vieira, and CMM, jointly and severally, or against George Vieira, individually. The affiliated entities filed a notice of appeal from the amended judgment. That appeal is our case No. F056943.

The trial court also entered a series of orders granting plaintiffs' motion for attorney fees, granting their motion to strike and tax costs, denying CVD's motion for attorney fees, and denying defendants' motion to strike and tax costs. CVD and the Vieira defendants filed a notice of appeal from these orders. That appeal is our case No. F056917.

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[5] Plaintiffs have sought judicial notice of a printout from the Web site of the California Secretary of State purporting to show that CVD was a suspended corporation. Plaintiffs asserted in their respondent's brief that CVD's appeal should be dismissed, citing *Boyle v. Lakeview Creamery Co.* (1937) 9 Cal.2d 16, 20-21 (suspended corporation has no right to prosecute appeal or defend an action). CVD opposed the request for judicial notice and subsequently requested judicial notice of a certificate of the Secretary of State, in effect showing reinstatement of the corporation. We deferred consideration of both requests for judicial notice until determination of the appeal on the merits. We now deny plaintiffs' request for judicial notice (Evid. Code, § 450) and grant CVD's request for judicial notice (Evid. Code, § 452, subd. (c).) We also deny as untimely and irrelevant plaintiffs' "motion for request for judicial notice" filed September 7, 2010.

Discussion

A. *The Fraud Cause of Action*

1. Introduction

The jury awarded plaintiffs a total of $17.6 million based on its conclusion that the Vieira defendants fraudulently deprived CVD of valuable corporate opportunities by selling milk through CMM. The Vieira defendants contend, as they did in the trial court, that the fraud cause of action belonged to CVD, not to its individual members. For reasons that follow, we will agree.

Plaintiffs contend the fraud claim was properly brought by the plaintiffs as individuals, due to the unique characteristics of an agricultural cooperative. First, we will lay out the legal framework for plaintiffs' contention, then we will turn to the contention itself.

2. Shareholder Derivative Actions Generally

Under California law, an agricultural marketing cooperative is a corporation, albeit of a special type. A cooperative may be formed without shareholders, as was CVD, in which case its members are deemed to be shareholders for purposes of the General Corporation Law, Corporations Code section 100 et seq. The cooperative itself has all rights and powers of a corporation and is subject to the General Corporation Law except where provisions of that law "are in conflict with or inconsistent with the express provisions" of the nonprofit cooperative associations law, Food and Agricultural Code sections 54001 to 54294. (§ 54040.)

Under California corporation law, a shareholder cannot bring a direct action for damages to the shareholder on a claim that wrongdoing by management injured the corporation. The corporation itself must bring such an action or, in some circumstances, the shareholders may sue on the corporation's behalf. (*Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 312.) "In light of the directors' role in the operation of the business affairs of the corporation, where conduct, including mismanagement by corporate

officers, causes damage to the corporation, it is the entity that must bring suit; the individual shareholder may not bring an action for indirect personal losses (i.e., decrease in stock value) sustained as a result of the overall harm to the entity." (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 788.)

If the board of directors of a corporation refuses to act to redress injuries to the corporation, a shareholder may, on certain conditions (see Corp. Code, § 800), sue on behalf of the corporation. Such an action commonly is referred to as a shareholders derivative action. In such an action, in addition to the procedural requirements of Corporations Code section 800, the right to relief belongs to the corporation and not to the shareholder-plaintiff. (*Bader v. Anderson, supra*, 179 Cal.App.4th at p. 788.) "A derivative lawsuit is in essence a consolidation in equity of two suits, one by the shareholder against the directors seeking an order that they sue those who have wronged the corporation, and the other by the corporation against the wrongdoers." (*Id.* at p. 789.)

A cause of action is derivative, and cannot, therefore, be asserted individually by a shareholder, if "'the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets.'" (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106-107.) "Shareholders may bring a derivative suit to, for example, enjoin or recover damages for breaches of fiduciary duty directors and officers owe the corporation.… An individual cause of action exists only if damages to the shareholders were not *incidental* to damages to the corporation. [Citation.]" (*Id.* at p. 107.) "Examples of direct shareholder actions include suits brought to compel the declaration of a dividend, or the payment of lawfully declared or mandatory dividends, or to enjoin a threatened ultra vires act or enforce shareholder voting rights." (*Schuster v. Gardner, supra,* 127 Cal.App.4th at p. 313; see also *Avikian v. WTC Financial Corp.* (2002) 98 Cal.App.4th 1108, 1116 [shareholders alleged the defendant officers and directors looted corporate assets and entered into self-

serving deals to sell assets to third parties; claims held to be derivative in nature and properly dismissed].)

The determination that a cause of action is derivative has three important consequences. First, among the other requirements of Corporations Code section 800, is a requirement that the plaintiff in a derivative action allege "with particularity plaintiff's efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort, and allege[] further that plaintiff has either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which plaintiff proposes to file." (Corp. Code, § 800, subd. (b)(2).)

Of at least equal importance is the right of the board of directors of the corporation to make an independent, good-faith determination whether to pursue the cause of action. If independent directors make a good-faith determination not to pursue litigation, such a determination is binding on the shareholders. "Neither the merits of the derivative claim nor the substance of the committee's decision to reject the claim is subject to judicial review at that stage." (2 Ballantine & Sterling, Cal. Corporation Law (4th ed. 2010) § 292.05, p. 14-32; see also *Finley v. Superior Court* (2000) 80 Cal.App.4th 1152, 1155-1157 [members of nonprofit homeowners' association precluded from pursuing derivative action in light of independent directors' determination not to pursue action]; see also *Bezirdjian v. O'Reilly* (2010) 183 Cal.App.4th 316, 322-323 [applying Delaware law].)

Finally, not only does the cause of action in a derivative action belong to the corporation, the damages also belong to the corporation. Once again, the board of directors is invested with discretion to distribute any such award. (*Sanchez v. Grain Growers Assn.* (1981) 126 Cal.App.3d 665, 673.) Even in the case of a nonprofit agricultural cooperative that is required to distribute net income on a patronage basis (see

§ 61333), the board of directors still is entitled to exercise discretion to establish retained-capital requirements and otherwise to determine net proceeds. (See § 54262.)

If the present case is controlled by the general law of corporations, there is no question the causes of action for fraud against the Vieira defendants would be derivative claims that could not result in an award of damages to the plaintiffs directly.[6] "An action is clearly derivative if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders …." (2 Ballantine & Sterling, Cal. Corporation Law, *supra,* § 291.03, pp. 14-9 to 14-10, fns. omitted.) "Thus, generally speaking, actions based on the misfeasance or negligence of the managing officers of a corporation, resulting in diminution of its assets, are derivative because the alleged mismanagement injures the corporation directly and the shareholders consequentially." (*Id*. at p. 14-11; see also *Schuster v. Gardner, supra,* 127 Cal.App.4th at p. 313.)

3. Plaintiffs' Contentions

The fraud cause of action, which resulted in the $17.6 million verdict against George Vieira, Mary Vieira, and CMM, was presented to the jury through the following questions: "Did [each of the Vieira defendants] use California Milk Market to sell milk and other dairy products that should have been sold directly by Central Valley Dairymen, Inc.?" "Did these transactions deprive Central Valley Dairymen, Inc. of a corporate opportunity that had value to Central Valley Dairymen, Inc.?" The verdict form then asked what each plaintiff's' damages were from the conduct of the Vieira defendants. (Previously, the court had instructed the jury that the "chief executive officer of a nonprofit corporation [*sic*] owes a fiduciary duty to the members of the cooperative." In his argument to the jury, plaintiffs' counsel stated that the damages should be based on

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[6] Plaintiffs did not meet the requirements of Corporations Code section 800 and did not attempt to pursue these claims as a derivative action.

the total amount diverted from CVD, and the amount awarded to the plaintiffs should be based on their combined 20 percent share of milk provided to CVD by its members. Thus, as plaintiffs' counsel stated to the jury, the claim for damages was based on "money out of the pockets of not only the Plaintiffs but all of the other members of CVD."

Plaintiffs contend that, notwithstanding general corporation law, fraud claims by members of a nonprofit agricultural cooperative are individual claims even if the fraud claims diminish the value of the membership interest uniformly among all the members. Plaintiffs give two reasons in support of their argument. First, plaintiffs contend that, because a nonprofit agricultural marketing cooperative is a fiduciary and trustee of money received for its members' product, it is also a fiduciary and trustee of funds that *would have* been received by the cooperative if the fraud or diversion of business opportunities had not occurred. Second, plaintiffs contend that because CVD was their fiduciary and agent, George Vieira was their subagent and also had a fiduciary duty to plaintiffs directly. We address each rationale in turn.

4. CVD as a Corporation for Purposes of this Action

The multiple aspects of a cooperative's business existence are treated in various ways under the law. For example, the cooperative is a corporate entity for purposes of buying insurance, paying employees, and leasing or owning property. (See, e.g., §§ 54171, 54176.) In holding the proceeds of the sale of milk, it is a trustee of the funds on behalf of its members. In the case of sales of milk, the cooperative is the corporate seller of the product, acts as the agent of its members, and receives the proceeds of the sale in trust for its members, all in the course of a single transaction. (See *Bogardus v. Santa Ana W.G. Assn.* (1940) 41 Cal.App.2d 939, 947-948.)

Accordingly, the fact that a cooperative is not a separate entity for tax purposes (that is, the net proceeds must be distributed on a patronage basis and are taxed only to the patronage recipient) does not prevent its members from enjoying the limited-liability

protections inherent in organizing as a corporation. (See Roberts-Caudle, *Agricultural Cooperative Member Equity: You Don't Have To Die for It!* (1997) 7 S.J. Agric. L.Rev. 1, 7-8; see *id*. at pp. 12-13.) In other words, the applicability of a legal standard to one type of activity of the cooperative neither forecloses nor requires that same standard for all of its other activities. "The source of law appropriate to resolve a controversy involving a cooperative turns upon the characterization of the cooperative's conduct." (*Id*. at p. 13.)

In the present case, the corporate aspects of the cooperative's activities predominate over any fiduciary or agency aspects. The fraud occurred over a period of years, during which the membership of the cooperative may have changed and over the course of which the members' use of the cooperative (and therefore the amount of their patronage dividends) varied. The cooperative, not its members, would have been the contracting party for the sales of milk if the fraud had not occurred. (See §§ 54261, 54262.) Many steps, including payment of expenses, ascertainment of capital requirements by the board by directors, and other business decisions of that body, were necessary before the proceeds of any particular sale of milk by the cooperative could be translated into an amount owed to any individual member. (See *Sanchez v. Grain Growers Assn.*, *supra*, 126 Cal.App.3d at p. 673 ["It is undisputed that retains declared to be surplus cannot be withheld from members, but prior to such a determination, members have no enforceable right to these funds. There is only a *potential* right of repayment, subject to the board of director's discretionary action."].)[7]

[7] Plaintiffs contend that for any given fiscal year, the board of directors had already determined costs and expenses; accordingly, plaintiffs argue, any additional money recovered for a completed year necessarily would be distributed as patronage dividends. This argument misconstrues the broad discretion vested in the board of directors. If the cooperative recovered additional funds from CMM, the board would be entitled to exercise its business judgment, for example, to engage in additional marketing or to make capital improvements, prior to determining what portion of the additional funds would be

By contrast, as to the individual members, the agency and trusteeship aspects were extremely limited. Even in the absence of the fraud found by the jury, the sales of the milk would not have been for the account of any particular member; particular milk was not supplied by any identified member; and the costs of the sale would have been borne by all the members jointly. The same injury affected all of the members. (See *Jones v. H.F. Ahmanson & Co., supra*, 1 Cal.3d at p. 107.)

Plaintiffs have cited no case or other authority for the proposition that an incorporated cooperative cannot maintain an action in its own name when it is defrauded of business opportunities. Under the Corporations Code, it is empowered to undertake such litigation, and nothing in the Food and Agricultural Code purports to take away that power. (See Food & Agri. Code, § 54178.) We conclude any cause of action for fraudulent deprivation of CVD's business opportunities must be pursued by or in the name of CVD.

5. George Vieira as a Subagent of CVD

Plaintiffs also contend that because CVD was their fiduciary and agent, George Vieira was their subagent and also had a fiduciary duty to plaintiffs directly. Plaintiffs are correct that, in general, "[a]ctive participants in the breach of fiduciary duty by another are accountable for all advantages they gained thereby …." (*County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 543.) In the present case, however, it is not alleged that CVD, as an entity, was involved in the fraudulent scheme. Thus, this case is unlike *Andrews Farms v. Calcot, Ltd.* (E.D.Cal. 2007) 527 F.Supp.2d 1239, 1253, upon which plaintiffs rely. In that case, the cooperative, acting through its board of directors, was actively involved in perpetrating the malfeasance. Here, CVD was not. As

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distributed to members on a patronage basis. Thus, even as to funds recovered from CMM after the close of the fiscal year in which the milk was delivered, determination of patronage dividends is a discretionary act of the board of directors, not merely a mathematical calculation.

described in respondents' brief, "the Vieiras and CMM bilked [millions] from CVD." The Vieira defendants did not participate *with* CVD in a scheme to defraud plaintiffs.

6. Conclusion

We conclude the judgment against the Vieira defendants must be reversed. As a consequence, we need not and do not decide the other claims presented by the Vieira defendants. Those claims include: that the evidence did not support the verdict and that the damages were excessive.

B. Fraud and Misrepresentation Claims Against George Vieira

The five investor-plaintiffs[8] asserted a cause of action against George Vieira for fraud and deceit arising from misrepresentations that, plaintiffs alleged, caused them to invest in Valley Gold. This claim was resolved by the jury through its answers to three sets of questions, concerning intentional misrepresentation, concealment, and negligent misrepresentation. After trial, the court determined the three portions of the verdict were duplicative and that all three sought to award damages for the same underlying harm. It revised the judgment to include only the damages awarded by the jury for concealment.

As to concealment, the jury concluded George Vieira was "an officer or in control of [CVD] and [was] in a fiduciary relationship with plaintiffs who were investors in Valley Gold, LLC." The investor-plaintiffs reasonably relied on the misrepresentations in investing in Valley Gold and were injured thereby in the amount of $30,000 each, except for Manuel Cipriano, whose damages were $45,000.

On appeal, George Vieira makes two arguments. First, he contends the evidence showed that any and all misrepresentations (and failures of full disclosure) occurred in the "Confidential Private Offering" prepared by Downey Brand, a law firm retained by Valley Gold, LLC. Thus, George Vieira did not "make any representations to anyone,"

[8] The five are: Joe Nunes, John Nunes, Antonio Brasil, Manuel Luis, and Manuel Cipriano.

as appellant's opening brief phrases the matter. Second, George Vieira argues in his opening brief that he had no duty "to disclose the nature and extent of his criminal involvement with Suprema." He says he was merely the plaintiffs' coinvestor. "Implying a duty to disclose under these circumstances would lead to absurd results. Any investor in any enterprise could sue for fraud if a coinvestor failed to disclose something which was later determined to be important to the original investor." Citing *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, he says that a "duty to disclose can only come into being as a result of a transactional relationship between the parties, such as a relationship between seller and buyer, employer and employee, doctor and patient, or parties to a contract where something passes back and forth between Plaintiff and Defendant."

The investor-plaintiffs contend, to the contrary, that George Vieira was their fiduciary, as they put it, "either directly or as a subagent of CVD." In addition, they contend, George Vieira orally made direct, relevant misrepresentations to them and failed to disclose facts that would have clarified other half-truths he orally espoused.

In light of the complex interrelationships of the parties, George Vieira's very simplistic analysis is wholly inadequate. For example, it may be that information was disclosed to the investor-plaintiffs primarily through the written offering memorandum prepared by third-parties. Yet the jury reasonably could infer that much of the information contained in the memorandum came from George Vieira and that he provided it to Downey Brand with the intent and expectation that they would convey it to the investor-plaintiffs. George Vieira does not claim that Downey Brand mischaracterized the information given to them; he only contends *he* did not make the representations to the investor-plaintiffs. George Vieira cites no authority for the proposition that his intentional and fraudulent use of an intermediary absolves him of responsibility for the misstatements.

Further, there is ample evidence that George Vieira orally made material misrepresentations directly to the investor-plaintiffs. Most fundamentally, he misrepresented that he would be investing $500,000 of his own money in Valley Gold. The jury reasonably could have concluded, based on ample evidence, that George Vieira knew the $500,000 was not his, but belonged to CVD.[9] The jury reasonably could conclude that George Vieira impliedly represented that he would be the hands-on manager of Valley Gold's operations when, in reality, he knew he probably would be sentenced to prison for his part in the Suprema scheme.

Finally, George Vieira is incorrect when he states that he had no "transactional relationship" with the investor-plaintiffs sufficient to impose a duty upon him to disclose truthfully the facts concerning Valley Gold. While George Vieira was not directly selling shares in Valley Gold to the investor-plaintiffs, he was a copurchaser of such shares. As such, his "investment" (albeit purloined from CVD, as noted above) could only be successful if the investor-plaintiffs and others were persuaded to invest in Valley Gold along with him. Between George Vieira's asserted management role as the key to Valley Gold's success,[10] and his role as copurchaser of shares in Valley Gold, we conclude that there is ample "transactional relationship" between George Vieira and the investor-plaintiffs to support a duty to disclose. (See *LiMandri v. Judkins, supra*, 52 Cal.App.4th at p. 337.)

We conclude the judgment for the investor-plaintiffs and against George Vieira must be affirmed.

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[9] The evidence was that George Vieira convinced the CVD board of directors that he was owed $500,000 in unpaid bonuses, which he directed CVD to pay over to Valley Gold in return for shares in the name of a corporation owned by the Vieira defendants.

[10] The offering memorandum states: "The Company's success in managing and operating the Cheese Plant is dependent almost exclusively upon the abilities of Mr. Vieira" and two other persons.

C. The Postverdict Motion To Add Judgment Debtors

As described above, plaintiffs filed a postjudgment motion to add certain corporations as additional judgment debtors. The motion was premised upon proof that "George and Mary Vieira own, control, represent, direct, manage and otherwise use [the affiliated entities] for their own personal benefit." Over the objection of the Vieira defendants, the court granted the motion and ordered entry of an amended judgment that included the affiliated entities as judgment debtors in each instance in which the original judgment awarded judgment against either the Vieira defendants, jointly, or George Vieira, individually.

The Vieira defendants and the affiliated entities acknowledge that in a proper case additional judgment debtors may be added pursuant to Code of Civil Procedure section 187. They contend, however, this is not a case in which the court may exercise that power. Citing *Postal Instant Press, Inc. v. Kaswa Corp.* (2008) 162 Cal.App.4th 1510 (*PIP*), they contend California law does not permit piercing the corporate veil to hold a *corporation* liable for debts of its *shareholders*, even in circumstances in which the law would allow a shareholder to be liable as the alter ego of a corporation.

Plaintiffs, citing *Taylor v. Newton* (1953) 117 Cal.App.2d 752 (*Taylor*) and *Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 363, contend that alter ego liability is permitted in California when a corporation is solely owned by the shareholders who were the original judgment debtors, and those shareholders have fraudulently transferred property to the corporations for their own personal benefit. They contend there is no reason in law or logic to limit the judgment creditors' ability to reach assets that are still under the effective control of the original judgment debtors, even if those assets have been sheltered in a corporation.

In light of our conclusions concerning the necessity of reversing the judgment against the Vieira defendants, we are faced with the applicability of these various

arguments only with respect to the remaining judgment against George Vieira, individually, on the various causes of action relating to Valley Gold.

We agree with plaintiffs that the documentation they presented in the posttrial proceedings clearly established that the affiliated entities were owned and controlled by both George Vieira and Mary Vieira. That same proof, however, establishes as a necessary consequence that George Vieira is not the sole owner of the affiliated entities. In its present posture, this case is governed by *PIP*, *supra*, 162 Cal.App.4th 1510, and must be distinguished from *Taylor*, *supra*, 117 Cal.App.2d 752.

In *PIP*, the original judgment debtor was a former shareholder of a corporation. Plaintiff sought to add the corporation as an additional judgment debtor. The core problem in *PIP* was that the original judgment debtor was not the sole shareholder of the corporation: "At the time of the litigation, [the judgment debtor] was not the sole shareholder of [the corporation]. PIP failed to show that innocent creditors would be adequately protected." (*PIP*, *supra*, 162 Cal.App.4th at p. 1524.) Thus, the summary procedure available under Code of Civil Procedure section 187 was inequitable and unnecessary; the creditor could levy on the debtor's shares in the corporation or move to set aside any fraudulent transfers by the debtor to the corporation. (*PIP*, *supra*, 162 Cal.App.4th at p. 1524.)

In *Taylor*, *supra*, 117 Cal.App.2d 752, the trial court found that the judgment debtor was the sole shareholder of the corporation; that the judgment debtor "used the defendant corporation for his own purposes, and the separateness and individuality of the defendant corporation and [the judgment debtor] does not exist"; and "that these circumstances unjustly deprive[d] plaintiff of money due her …." (*Id*. at p. 756.) The Court of Appeal affirmed the order adding the corporation as an additional judgment debtor.

We conclude that, as a result of the reversal of the causes of action against the Vieira defendants jointly, George Vieira has not been shown to be the alter ego of the

affiliated entities. Accordingly, *Taylor, supra,* 117 Cal.App.2d 752, is not controlling. (See also *Wood v. Elling Corp., supra,* 20 Cal.3d at p. 364.)[11]

It may be that George Vieira fraudulently transferred his property to the affiliated entities and that plaintiffs are equitably entitled to have those transfers set aside. In the absence of joint liability of all the shareholders of the affiliated entities, however, such contentions are properly pursued by these plaintiffs in enforcement-of-judgment proceedings, as stated in *PIP, supra,* 162 Cal.App.4th at page 1524, and not in a summary proceeding that ignores the equitable interests of Mary Vieira, if any.

D. Evidence of George Vieira's Plea Agreement

George Vieira contends the trial court "abused its discretion" in permitting plaintiffs to question George Vieira about his criminal activities, "forcing" George Vieira to invoke his Fifth Amendment right to silence before the jury. Appellant's motion to exclude this evidence in the trial court was based on Evidence Code section 352.

In this court, appellant contends: "A witness may not be forced to invoke his or her Fifth Amendment privilege in front of the jury." In support of this proposition, appellant cites several criminal cases.

As a matter of federal constitutional law, however, the United States Supreme Court has noted "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a *party to a civil cause*.' 8 J. Wigmore,

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11 The *PIP* court also conducted a rather esoteric examination of a doctrine it called "outside reverse piercing of the corporate veil" and concluded such a practice is not permitted under California law. (See *Pip, supra,* 162 Cal.App.4th at pp. 1518-1524.) We need not and do not reach the question whether a judgment creditor may be permitted to reach corporate assets through a Civil Code section 187 motion when the judgment debtor is the *sole* shareholder of the corporation, nor the broader question whether California law permits "outside reverse piercing" .

Evidence 439 (McNaughton rev. 1961)." (*Baxter v. Palmigiano* (1976) 425 U.S. 308, 318, italics added; see also *Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 885-886; *Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 712 ["It is well settled that the privilege against self-incrimination may be invoked not only by a criminal defendant, but also by parties or witnesses in a civil action.… However, while the privilege of a criminal defendant is absolute, in a civil case a witness or party may be required either to waive the privilege or accept the civil consequences of silence if he or she does exercise it."].)

California statutory law, not the Fifth Amendment, prevents a trier of fact from drawing adverse inferences against a party in a civil case based solely upon that party's assertion of the Fifth Amendment privilege against self-incrimination (or any other privilege, for that matter). (See Evid. Code, § 913, subd. (a); *In re Scott* (2003) 29 Cal.4th 783, 815-816.) The jury in this case was instructed: "George Vieira has exercised his legal right not to testify concerning certain matters. Do not draw any conclusions from the exercise of this right or let it affect any of your decisions in this case. A party may exercise this right freely and without fear of penalty." Appellant contends the jury disregarded this instruction and that his assertion of his Fifth Amendment privilege "clearly inflamed" the jury against him. His only evidence in support of this claim, however, is that he lost the case: The negative "passion" of the jury "was reflected in a verdict against him for $17.6 million. This was a clear miscarriage of justice."

In reality, there was abundant evidence of appellant's criminal conduct, independent of his invocation of the Fifth Amendment privilege. Plaintiffs introduced a transcript of appellant's sworn testimony at the time of that guilty plea. In that testimony, he described in detail his criminal activities. Such sworn testimony in the criminal proceeding was admissible in the present case, regardless of the finality of guilty plea itself. (See Evid. Code, § 1220 ["Evidence of a statement is not made inadmissible by

the hearsay rule when offered against the declarant in an action to which he is a party …."].)

To the extent appellant is contending that the act of invoking the privilege before the jury was unduly prejudicial under Evidence Code section 352, we conclude any possible effect upon the jury of appellant's invocation of the privilege was insignificant in light of the properly admissible, detailed, and sworn admissions contained in the transcript of the plea proceedings. Appellant has not demonstrated that the court's ruling was error, nor has he established that the ruling was prejudicial. (*People* v. *Watson* (1956) 46 Cal.2d 818, 836.)

E. The Breach of Contract Judgment against CVD

Plaintiffs sued CVD for breach of contract based on its failure to pay plaintiffs for dairy products sold by CVD to Valley Gold on behalf of the plaintiffs. The special verdict form asked the jury, "Did defendant Central Valley Dairymen, Inc., agree to pay one or more plaintiffs for their milk?" The jury answered that CVD did make such an agreement as to all plaintiffs. The amount of damages suffered by each plaintiff was established by stipulation of the parties, and judgment, after offsets for cross-claims where applicable, was entered for each plaintiff.

On appeal, the parties agree that Valley Gold never paid CVD for milk received from CVD's member-producers. Thus, on appeal the question is, in essence, whether CVD had an obligation under its by-laws to pay its producers for that milk regardless of nonpayment to CVD by Valley Gold. CVD contends the bylaws and statutory law require it to distribute to its members the "net returns" of money it actually receives for milk it has sold on behalf of its members. Plaintiffs contend such "pay if paid" contracts are unenforceable in California as a matter of public policy and that the Food and Agricultural Code "specif[ies] how [plaintiffs] should have been paid."

Plaintiffs' reliance on *Wm. R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 Cal.4th 882, 888-897, and *Capitol Steel Fabricators, Inc. v. Mega Construction Co.* (1997) 58

Cal.App.4th 1049, 1059-1060, is misplaced. Those cases hold that "a general contractor's liability to a subcontractor for work performed may not be made contingent on the owner's payment to the general contractor …." (*Wm. R. Clarke Corp. v. Safeco Ins. Co., supra,* 15 Cal.4th at pp. 896-897.) The basis for this prohibition is that "pay if paid" contracts in such circumstances would interfere with the statutory mechanic's lien rights of subcontractors, which statutory rights are expressly nonwaivable (with certain narrow exceptions). (*Id*. at pp. 889-890; see Civ. Code, § 3262.) Implicit in the *Clarke* court's discussion, as well as the discussion in the dissenting opinion, is the premise that outside the mechanic's lien setting, pay if paid contract provisions are permitted and do not generally violate public policy. (See 15 Cal.4th at p. 902, fn. 2 (dis. opn. of Chin, J.).)

In addition to their public-policy argument, plaintiffs also contend that the "statutory and regulatory scheme specify how [plaintiffs] should have been paid." They cite section 62191, subdivision (b)(4) and section 1001(d) of the California Department of Food and Agriculture Pooling Plan for Market Milk (July 1, 1997) (hereafter Pooling Plan).

Plaintiffs' reference to section 62191 is somewhat puzzling. Although that section requires payment "for the amount of the market milk delivered" (§ 62191, subd. (b)(4)), the section applies only to milk "handlers." (§ 62181; see *id*. at § 61826 [general definition of "handler"].) When a nonprofit marketing association, such as CVD, engages in any transaction involving bulk milk produced by its members, the cooperative generally is not treated as a "handler," but as a "producer" of milk products. (§ 61872.) A cooperative is a "handler," and subject to the payment rules of section 62191, only when it engages in a transaction involving milk from nonmembers, that is, those to whom it does not "account[] on a patronage basis" or when the cooperative prepares its members' bulk milk for retail sale. (*Id*. at § 61872.) Accordingly, we hold that section

62191 is inapplicable when the cooperative is marketing to a processor, such as Valley Gold, bulk milk supplied by the members of the cooperative.

Similarly, Pooling Plan section 1001 requires payment by handlers to milk producers in accordance with monthly deadlines. Once again, however, an agricultural cooperative "in its capacity as the marketing agent for producer milk with respect to the milk of its member producers which it markets [to third parties] and receives payment therefore under authority of contracts or agreements with its individual members" is not a "handler" for purposes of Pooling Plan section 1001(d). (Pooling Plan, § 105(c).)

Section 8.04 of the bylaws of CVD provides that "net returns" shall be based on money "received" for such milk, less operating expenses and reserves. It is the "net returns" -- i.e., receipts less expenses and reserves -- that must be paid to the members. (See Bylaws, § 8.02(f).) While the directors of CVD have a duty to determine net returns, and CVD has a duty to make a timely distribution of these surplus funds (see *Sanchez v. Grain Growers Assn., supra*, 126 Cal.App.3d at p. 673), we conclude there is no contractual duty on the part of CVD to pay its members for milk when there are no "net returns," as was the case when Valley Gold failed to pay for milk it received. There is no evidence CVD failed to pay to plaintiffs any net returns under the terms of the bylaws. The judgment against CVD must be reversed.

F. Orders Taxing Costs and Awarding Costs and Attorney Fees

The final portion of this appeal involves the trial court's orders taxing costs and awarding costs and attorney fees. These orders were based, in whole or in part, on the court's determination of the prevailing party in various aspects of the case. Our reversal of significant portions of the judgment will require a reevaluation of the prevailing party question. That reevaluation, and the subsequent award of costs and attorney fees, is properly undertaken by the trial court on remand. Accordingly, in conjunction with our reversal of the judgment, we will reverse the costs and attorney fee orders and remand those issue to the trial court.

DISPOSITION

The judgment is reversed insofar as it awards damages to plaintiffs from George Vieira, Mary Vieira, and CMM, jointly and severally. The judgment is reversed insofar as it awards damages to plaintiffs from CVD. The judgment is reversed insofar as it adds the affiliated entities as judgment debtors. The award of costs and attorney fees is reversed. In all other respects, the judgment is affirmed. Issues concerning the award of costs and attorney fees on appeal shall be addressed by the trial court on remand.

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Ardaiz, P. J.

WE CONCUR:

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Cornell, J.

_____
Gomes, J.